STATE OF MICHIGAN

COURT OF APPEALS

GERARD J. WIATER,

Plaintiff-Appellant,

v

GREAT LAKES RECOVERY CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
January 27, 2005

No. 250384
Marquette Circuit Court
LC No. 03-040316-NO

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this premises liability case. We reverse and remand. This case is being decided without oral argument under MCR 7.214(E).

Plaintiff argues that the trial court erred by granting summary disposition to defendant because the "clear ice" in the parking lot at issue should not be considered an open and obvious danger and further, even if the condition was open and obvious, it was nevertheless unreasonably dangerous because of "special aspects," specifically that the ice was effectively unavoidable. Defendant responds that the alleged icy condition was open and obvious and that there were not special aspects making the condition unreasonably dangerous. Defendant alternatively argues that there was no evidence that ice in the parking lot was the cause of plaintiff's fall and that plaintiff was merely a licensee at the time of the incident and, accordingly, was only owed a duty to be warned of hidden dangers.

We review a decision on a motion for summary disposition de novo. *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). In considering a motion for summary disposition under MCR 2.116(C)(10), the documentary evidence submitted by the parties is considered in the light most favorable to the party opposing the motion to determine if there is a genuine issue of material fact. *Id*.

First, under the undisputed facts of this case, plaintiff was an invitee of defendant at the time of the incident. To create invitee status, the relevant circumstances "must be directly tied to the owner's commercial business interests." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 603-604; 614 NW2d 88 (2000). In *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993), this Court held that "the duties owed by a landlord to the social

guests of a tenant are duties owed to invitees, not licensees." This Court noted a comment from the Restatement Second of Torts that included the following:

> It is the lessor's business, as such, to afford his lessee facilities for receiving all persons whom he chooses to admit for any legitimate purpose. Therefore, a person who, as between himself and the lessee, is a licensee entered the land on a matter directly connected with the business of the lessor. [*Id*. at 541, quoting 2 Restatement Torts, 2d, § 360, comment f, p 253.]

Because Lynn LaVictor was a resident at defendant's facility, he was effectively in the position of a tenant in relation to defendant for present purposes. Indeed, LaVictor testified at his deposition that defendant "took, like, 30, 40 percent" out of his paycheck from the Salvation Army as "rent." Accordingly, it follows from *Petraszewsky* that plaintiff was an invitee of defendant at the time of the incident because plaintiff was on the premises essentially as a guest of LaVictor. Further, LaVictor was at the facility as a federal parolee and that plaintiff came to the facility to take LaVictor to his job. Clearly, employment would be part of LaVictor's rehabilitation and, thus, plaintiff's presence at defendant's facility to help LaVictor get to his job was directly connected with defendant's business for that reason as well.

A premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But, in this regard, a premises possessor is not required to protect an invitee from open and obvious dangers unless special aspects of an open and obvious condition make it unreasonably dangerous. *Id*. at 516-517. To qualify as a "special aspect," a condition must involve "a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id*. at 518-519. A danger is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Joyce, supra* at 238, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Contrary to plaintiff's argument, there is no evidence to reasonably support a finding that the alleged icy condition of the parking lot at the time of the incident was not open and obvious. Plaintiff apparently bases his claim that there was evidence the condition was not open and obvious in substantial part on LaVictor's description of the ice in the parking lot as "clear ice." But LaVictor expressly testified that, "You could see the ice." He also testified that "any grown man" would have known it was icy. LaVictor also said that there was no snow on top of the ice. Accordingly, we conclude that there is no reasonable support in the evidence for a claim that the ice was not open and obvious, i.e., that an average user of ordinary intelligence would have been unable to discover it on casual inspection.

However, the trial court erred by granting summary disposition in favor of defendant because a reasonable person could conclude that the situation involved special aspects that rendered the open and obvious danger posed by the ice unreasonably dangerous. First, LaVictor indicated in his deposition testimony that it was his job as a resident of the facility to throw salt on the ice in the parking lot the morning of the incident but that he could not do so because there was no salt at the facility. Accordingly, there was evidence that defendant knew or should have known of the icy condition of the parking lot and failed to respond to it within a reasonable time.

A hypothetical example presented by our Supreme Court as part of its reasoning in *Lugo* is critical to the question of whether there was evidence that the situation at hand involved special aspects that rendered it unreasonably dangerous. The Court stated that a situation in which the only exit for the general public from a commercial building was covered with standing water might be a special aspect because "a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable." *Lugo, supra* at 518. LaVictor described the parking lot as having been "[c]overed all with ice" at the time of the incident. Thus, it is apparent that the ice was effectively unavoidable to a person who parked a vehicle in the parking lot and then proceeded to enter defendant's facility.

Defendant contends that the situation as described by LaVictor did not involve special aspects because plaintiff could have avoided walking on the ice by parking in an alternative location other than the parking lot in which he parked or because he did not need to enter the building to pick up LaVictor. We reject this argument because, if a plaintiff is injured as a result of a risk outside the open and obvious doctrine, a plaintiff's comparative negligence does not bar the cause of action, but only serves to reduce the amount of damages recoverable. *Lugo, supra* at 523. Thus, the *Lugo* Court expressly disapproved the trial court's reliance in that case on the plaintiff's failure to pay proper attention to the circumstances where she was walking in granting the defendant's motion for summary disposition. *Id*. Rather, the "subjective degree of care used by the plaintiff" is immaterial to whether a condition is unreasonably dangerous. *Id*. at 523-524. Instead, "the question is whether the *condition of the premises* at issue was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous." *Id*. at 523 (emphasis in original). Defendant made the parking lot available specifically as a place where a visitor could park. It should have been apparent to defendant that invitees who parked in the parking lot could not safely do so. We reject defendant's argument that it should avoid liability because plaintiff chose to park in the parking lot since defendant made the lot available to invitees generally despite its icy condition. There was evidence to create a genuine issue of material fact as to whether a special aspect made the situation unreasonably dangerous because it was effectively unavoidable to invitees who used the parking lot.

With regard to defendant's argument that there was insufficient evidence that ice in the parking lot caused plaintiff to fall, LaVictor essentially indicated in his deposition testimony that plaintiff fell as he was opening the drivers' side door of his vehicle and that, while he did not have a full view of the fall, he saw plaintiff's arms go up in the air. As discussed above, LaVictor testified that the parking lot was covered with ice. Given the lack of any other likely explanation for the rather unusual event of plaintiff falling in the parking lot, a reasonable factfinder could easily infer that it was more likely than not a result of plaintiff slipping on the ice. Thus, there was sufficient evidence of causation, i.e., that ice in the parking lot caused plaintiff's fall. See *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004) (evidence must support a reasonable inference of a logical sequence of cause and effect to support a finding of a causation, but does not need to negate all other possible causes).

We reverse the trial court's grant of summary disposition in favor of defendant and

remand the case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

I concur in result only.

/s/ Joel P. Hoekstra